No. 80-1663

Office - Supreme Court, U.S.
FILED
NOV 19 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T. W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO, and H. R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N. J. BOWERS, Individually and as he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F. R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J. T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R. A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G. W. DIXON, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W. P. LYNCH, Individually and as he is Fourth Vice President of International Longshoremen's Association, AFL-CIO,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

THOMAS W. GLEASON
Counsel for Petitioners
One State Street Plaza
New York, N. Y. 10004
(212) 425-3240

CONDON & DOYLE
75 Federal Street
Boston, Ma. 02110

Of Counsel:

ERNEST L. MATHEWS, JR.
CHARLES R. GOLDBURG
KEVIN J. MARRINAN

Questions Presented

1. Whether the domestic effects of a union's refusal to handle Russian goods, undertaken to protest Soviet military aggression, are "in commerce" so as to be within the purview of the Labor Management Relations Act (LMRA)?

2. Whether longshoremen's refusal to perform services may be the basis for an action under LMRA § 303, 29 U.S.C. § 187, alleging a violation of the secondary boycott proscriptions of LMRA § 8(b)(4), 29 U.S.C. § 158(b)(4), where

   (a) any unlawful object must be inferred exclusively from the effects of the conduct which are not separable from its admitted noneconomic purpose;

   (b) the union activity is not motivated by a primary labor dispute;

   (c) no labor dispute is involved except a controversy with the union's employers over the scope of their collective bargaining agreement;

   (d) the claims of any third party sound in tortious interference with contract, which is cognizable under state law?

3. Whether the action of a union which supports and endorses the desire of its members to refrain from participation in morally repugnant work and to protest aggression is protected by the First Amendment from restraint by the application of the LMRA and from interference by a government agency?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Statutory Provisions Involved	2
Statement of the Case	2
Proceedings Below	2
Statement of Facts	3
Summary of Argument	5
ARGUMENT—	
I. Petitioners' Activities Were Not in Commerce	8
II. Petitioners' Conduct Did Not Violate §8(b)(4)	24
A. The Unlawful Object, Essential to a Violation of §8(b)(4), Cannot Be Made Out	24
B. There Can Be No Violation of §8(b)(4) Without a Primary Labor Dispute	28
C. Petitioners' Conduct Was Not the Kind of Activity §8(b)(4) Was Enacted to Prevent	29
D. The Only Feasible Labor Dispute Is With Petitioners' Employers	31
E. This Court Should Not Permit Federalization of What Is Essentially a State Claim	32

PAGE

III. Petitioners' Conduct Is Protected by the First Amendment 33

A. First Amendment Rights Are at Stake in This Case 33

B. To Hold That Petitioners' Conduct Violates §8(b)(4) Would Contravene the First Amendment 37

IV. Summary Judgment Should Not Have Been Granted 43

CONCLUSION 45

TABLE OF AUTHORITIES

Cases: PAGE

Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977) 35, 36n
Allen v. *Sisters of Saint Joseph*, 361 F. Supp. 1212 (N.D. Tex. 1973), *app. dism'd*, 490 F.2d 81 (5th Cir. 1974) 37n
Amalgamated Transit Union v. *Suscy*, 538 F.2d 1264 (7th Cir. 1976) 43
American Jewish Congress v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978) 36n
American Radio Association v. *Mobile Steamship Association*, 419 U.S. 215 (1974) ..... *passim*
Apex Hosiery v. *Leader*, 310 U.S. 469 (1940) 30
Associated Press v. *United States*, 326 U.S. 1 (1945) 44

Baldovin v. *International Longshoremen's Association*, 626 F.2d 445 (5th Cir. 1980) 4, 16, 22n, 41n
Benz v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957) 8n, 11
Big Apple Supermarkets v. *Dutto*, 237 F. Supp. 774 (E.D.N.Y. 1965) 30
Brown v. *Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978) 37n
Brown v. *Louisiana*, 383 U.S. 131 (1966) 33

California Motor Transportation Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 34n
Chrisman v. *Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974) 37n
Council for Employment and Economic Energy Use v. *WHDH Corp.*, 580 F.2d 9 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979) 31
Crown Central Petroleum Corp. v. *Waldman*, 486 F. Supp. 759 (M.D. Pa. 1980) 30, 42n

Danielson v. *Fur Dressers*, 411 F. Supp. 655 (S.D. N.Y. 1975) 28, 39

PAGE

Doe v. *Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973) 37n
Doe v. *Bolton*, 410 U.S. 179 (1973) 37n

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 41
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 33

Foster v. *Swift & Co.*, 615 F.2d 701 (5th Cir. 1980) 44

Gillette v. *United States*, 401 U.S. 437 (1971) 33
Grain Elevator Workers Local 418 v. *NLRB*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967), *enforcing Grain Elevator, Flour and Feedmill Workers, (Continental Grain Co.)*, 155 NLRB 402 (1965) 21n, 22

H. K. Porter Co. v. *NLRB*, 397 U.S. 99 (1970) 29n
Henry v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979) 41n

Incres Steamship Co. v. *International Maritime Workers*, 372 U.S. 24 (1963) 8, 8n
International Brotherhood of Electrical Workers v. *NLRB*, 341 U.S. 694 (1951) 39
International Longshoremen's Association Local 1416 v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970) 8n, 9n
International Longshoremen's Association (Allied Int'l Inc.), 257 NLRB No. 151 (1981) 4n
International Union, etc. v. *National Right to Work*, 590 F.2d 1139 (D.C. Cir. 1979) 36n
Investment Co. Institute v. *Board of Governors of the Federal Reserve System*, 606 F.2d 1004 (D.C. Cir. 1979) 36n
Isbrandtsen Co. Inc. v. *Local 1291, International Longshoremen's Association*, 204 F.2d 495 (3d Cir. 1953) 32

PAGE

Jacksonville Bulk Terminals, Inc. v. *International Longshoremen's Association*, No. (U.S.) 80-1045 .....3n, 7
Jody Fair Inc. v. *Dubinsky*, 225 F. Supp. 695 (S.D. N.Y. 1964) 30

Kusper v. *Pontikes*, 414 U.S. 51 (1973) 42

Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) 41
Letter Carriers v. *Austin*, 418 U.S. 264 (1974) 37
Local 1976, United Brotherhood of Carpenters v. *NLRB*, 357 U.S. 93 (1958) 24

Machesky v. *Bizzell*, 414 F.2d 283 (5th Cir. 1969) 41n
Madden v. *Grain Elevator Workers Local 418*, 334 F.2d 1014 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965) 21, 21n
Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270 (1956) .. 29n
McCulloch v. *Sociedad Nacional*, 372 U.S. 10 (1963) 8, 8n
Miller & Son Paving Inc. v. *Wrightstown Township Civic Association*, 443 F. Supp. 1268 (E.D. Pa. 1978), *aff'd*, 595 F.2d 1213 (3d Cir.) *cert. denied*, 444 U.S. 843 (1979) 30
Missouri v. *National Organization for Women, Inc.*, 467 F. Supp. 289 (W.D. Mo. C.D. 1979), *aff'd*, 620 F.2d 1301 (8th Cir. 1980) 30
Montgomery Ward & Co. v. *NLRB*, 385 F.2d 760 (8th Cir. 1967) 38
Mountain Navigation Co. v. *Seafarers International Union*, 348 F. Supp. 1298 (W.D. Wis. 1971) 40n

NAACP v. *Button*, 371 U.S. 415 (1963) 36n
NAACP v. *Patterson*, 357 U.S. 449 (1958) 36n
NLRB v. *American National Insurance Co.*, 343 U.S. 395 (1952) 29n
NLRB v. *Bradford Dyeing Association*, 310 U.S. 318 (1940) 29n

PAGE

NLRB v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972) 29n
NLRB v. *C.K. Smith & Co., Inc.*, 569 F.2d 162 (1st Cir. 1977) *cert. denied*, 436 U.S. 957 (1978) 32n
NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) 42
NLRB v. *Denver Building & Construction Trades Council*, 341 U.S. 675 (1951) 25n
NLRB v. *Ford Motor Co.*, 114 F.2d 905 (6th Cir.), *cert. denied*, 312 U.S. 689 (1940) 37
NLRB v. *Howard Quarries, Inc.*, 362 F.2d 236 (8th Cir. 1966) 38
NLRB v. *International Longshoremen's Association (Ocean Shipping)*, 332 F.2d 992 (4th Cir. 1964) 28, 39, 39n, 40, 40n
NLRB v. *Local 825, Operating Engineers*, 400 U.S. 297 (1971) 28
NLRB v. *Retail Stores Employees Union, Local 1001*, 447 U.S. 607 (1980) 26
NLRB v. *Twin City Carpenters District Council*, 422 F.2d 309 (8th Cir. 1970) 40n
National Maritime Union of America (Shippers Stevedoring Co.), 245 NLRB 29 (1979) ..... *passim*
National Maritime Union v. *NLRB*, 342 F.2d 538 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965) 40n
National Maritime Union v. *NLRB*, 346 F.2d 411 (D.C. Cir.), *cert. denied*, 382 U.S. 840 (1965) 40
National Woodwork v. *NLRB*, 386 U.S. 612 (1967) 28n
New Orleans Steamship Association v. *General Longshore Workers, ILA*, 626 F.2d 455 (5th Cir. 1980) 39n

Romero v. *Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980) 44
Roywood Corporation v. *Radio Broadcast Technicians*, 290 F. Supp. 1008 (S.D. Ala. 1968) 30

PAGE

San Diego Building Trades Council v. *Garman*, 359 U.S. 236 (1959) 20
Schneider v. *Irvington*, 308 U.S. 147 (1939) 38n
Shelton v. *Tucker*, 364 U.S. 479 (1960) 36
Sherbert v. *Verner*, 374 U.S. 398 (1963) 33
Socialist Workers Party v. *Attorney General of the United States*, 463 F. Supp. 515 (S.D.N.Y. 1978) 36n
Socialist Workers Party v. *Hardy*, 480 F. Supp. 941 (E.D. La. 1977) 36n
Soft Drink Workers Union v. *NLRB*, 90 LC 26,066 (D.C. Cir. 1980) 40
Southwire Co. v. *NLRB*, 383 F.2d 235 (5th Cir. 1967) 37
Spence v. *Washington*, 418 U.S. 405 (1974) 33
Sweezy v. *New Hampshire*, 354 U.S. 234 (1957) 33

Taylor v. *St. Vincents Hospital*, 523 F.2d 75 (9th Cir. 1975) 37n
Thomas v. *Collins*, 323 U.S. 516 (1945) 35
Thornhill v. *Alabama*, 310 U.S. 88 (1940) 35
Tinker v. *Des Moines*, 393 U.S. 503 (1969) 33
Toraso v. *Watkins*, 367 U.S. 488 (1961) 33

United Brotherhood of Carpenters & Joiners v. *NLRB*, 357 U.S. 93 (1958) 29
United Mine Workers v. *Illinois State Bar Association*, 389 U.S. 217 (1967) 35
United Public Workers v. *Mitchell*, 330 U.S. 75 (1946) 43
United States v. *Seeger*, 380 U.S. 163 (1965) 34

Vincent Ingino Inc. v. *Certified Preferred, Inc.*, 222 F. Supp. 109 (E.D.N.Y. 1963) 30

Walsh v. *International Longshoremen's Association*, 488 F. Supp. 524 (D. Mass. 1980), *vacated and remanded with instructions to dismiss on grounds of res judicata*, 630 F.2d 864 (1st Cir. 1980) 4, 4n, 16n

PAGE

Warth v. *Seldin*, 422 U.S. 490 (1975) 36n
Watkins v. *Mercy Medical Center*, 364 F. Supp. 799 (D. Idaho 1973) 37n
Welsh v. *United States*, 398 U.S. 333 (1970) 33, 34
Williams v. *Rhodes*, 393 U.S. 23 (1968) 42, 43
Windward Shipping v. *American Radio Association*, 415 U.S. 104 (1974) ..... *passim*
Wooley v. *Maynard*, 430 U.S. 705 (1977) 33

Young v. *American Mini Theatres*, 427 U.S. 50 (1976) 33

Statutes:

18 U.S.C. §2 ..... 34n

18 U.S.C. §2381 ..... 34n

28 U.S.C. §1254(1) 2

29 U.S.C. §157 9

29 U.S.C. §158(b)(4) ..... *passim*

29 U.S.C. §160 ..... 5n

29 U.S.C. §185 32

29 U.S.C. §187 ..... i, 2, 3

46 U.S.C. §1241(b)(2) 15n

Rules:

Fed. R. Civ. P. 12(b)(6) 2

Miscellaneous:

Political Boycott Activity and the First Amendment, 91 Harv. L. Rev. 659 (1978) 26

Weekly Compilation of Presidential Documents, Vol. 16, No. 2, Monday, January 14, 1980 ..... 27n

IN THE

Supreme Court of the United States

October Term, 1981

No. 80-1663

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the court of appeals is reported at 640 F.2d 1368 (1st Cir. 1981) and is reproduced as Appendix A to the petition herein. 1a *et seq.*[1] The judgment of the court of appeals is reproduced at J.A. at 22a *et seq.* The opinion of the United States District Court for the District of Massachusetts is reported at 492 F. Supp. 334 (D. Mass. 1980) and is reproduced at 99a *et seq.*

---

[1] References to the Appendices to the Petition for a Writ of Certiorari herein are designated: "—a"; to the Joint Appendix: "J.A. at —"; and to the appendix to the Supplemental Memorandum for the United States as Amicus Curiae: "S.M. at —."

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the court of appeals was entered January 6, 1981. The petition herein was filed on April 3, 1981 and granted on October 5, 1981.

Constitutional Provision Involved

The First Amendment to the Constituion of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statutory Provisions Involved

The relevant statutory provisions are §8(b)(4) of the Labor Management Relations Act, 29 U.S.C. §158(b)(4); and §303 of the Labor Management Relations Act, 29 U.S.C. §187. The pertinent parts of these statutes are reproduced in the petition for certiorari at pp. 2-3.

Statement of the Case

Proceedings Below

This case arises on petitioners' motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief can be granted. The district court granted the motion. 108a. The court of appeals by a divided panel affirmed dismissal of respondent's antitrust and admiralty tort counts but reversed as to respondent's count under Labor Management Relations Act (LMRA)

§303, 29 U.S.C. §187, for damages by reason of a secondary boycott.[2]

Statement of Facts

This case is one of several arising from the refusal of members of Petitioner International Longshoremen's Association, AFL-CIO, (ILA) to handle goods bound to or from the U.S.S.R. or carried on Russian ships on account of the Soviet invasion of Afghanistan.[3] The ILA action was taken in "response to the overwhelming demands of the rank and file members," 640 F.2d at 1369, n.2, 3a, n.2, and was consistent with patriotic positions taken by the union in the past. J.A. at 57a-62a. It did not include ILA locals in Canada. J.A. at 61a. As the Fifth Circuit found in a related case:

> The ILA's objective in the instant case is to voice a political protest against the U.S.S.R. by refusing to handle cargo bound for that country. It has taken no steps to broaden that specific and limited objective. The parties have stipulated that the union has not refused to refer its members to the stevedoring companies to provide services for other cargoes. Even where the American entities have diverted ships from ports where the ILA work stoppage is effective to ports where it has been enjoined, the union has not struck those

---

[2] On May 5, 1981, respondent cross-petitioned this Court for a writ of certiorari to review the First Circuit's dismissal of the antitrust and tort counts. (No. 1906). The Court has not granted the cross-petition. The instant proceeding is limited to the issues raised by the court of appeals' sustaining of the LMRA §303 count.

[3] One of these cases, *Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n, ("JBT")* is pending before this Court, No. 80-1045. The order granting the writ herein set the case "for oral argument in tandem with No. 80-1045." Consequently, this brief will assume that the Court is generally familiar with the background of the ILA/Soviet action and the ensuing litigation, which is fully catalogued in Respondents' Brief in *JBT* p. 3, n.3.

entities' non-Soviet operations despite the fact that such American entities are clearly doing business with the Russians and avoiding the ILA work stoppage.

Baldovin v. *International Longshoremen's Association*, 626 F.2d 445, 452 (5th Cir. 1980). *See also* the First Circuit's decision in this case, 640 F.2d at 1380, 26a; *Walsh* v. *International Longshoremen's Association*, 488 F. Supp. 524, 530-31 (D. Mass. 1980), *vacated and remanded with instructions to dismiss on grounds of res judicata*, 630 F.2d 684 (1st Cir. 1980).

This case arose when longshoremen in the port of Boston refused to handle Soviet goods.[4] Respondent Allied International, Inc. (Allied) imports wood products from the Soviet Union, 640 F.2d at 1369, 2a; J.A. at 9a, both on Russian ships, J.A. at 39a, and by Waterman Steamship Lines (Waterman) J.A. at 9a, an American carrier which utilizes the stevedoring services of John T. Clark & Son of Boston, Inc. (Clark). J.A. at 35a. Clark employs longshoremen pursuant to a collective bargaining agreement with petitioners ILA and Local 799, 640 F.2d at 1369, 2a, which contains a broad no-strike clause and provides that employers may utilize non-ILA labor if the union "is not able or does not supply" labor. S.M. at 5a.

The immediate events which precipitated this litigation are set forth in the court of appeals' opinion. 640 F.2d at 1369-70, 2a-4a. The ILA refused to handle Russian cargo destined for Allied in the port of Boston, other than to complete unloading a Waterman ship already at berth. 640 F.2d at 1370, 3a; J.A. at 12a and 52a. As far as the ILA was concerned, Allied and Clark were free to unload

[4] The same events gave rise to *Walsh* and to a secondary boycott proceeding before the National Labor Relations Board. *International Longshoremen's Ass'n (Allied Int'l Inc.)*, 257 NLRB No. 151 (1981). The Board's decision is reproduced at S.M. 1a *et seq.* The decision of its administrative law judge is reproduced at 38a *et seq.* and at S.M. 43a *et seq.*

the Russian cargo by nonunion personnel. J.A. at 62a-63a; 106a-107a; Transcript of hearing before the district court at 32-34, 40, 43-45. Rather than pressing Clark to seek non-ILA labor, Waterman and Allied diverted another ship and unloaded the cargo in Montreal. 640 F.2d at 1370, 3a; J.A. at 37a. Additionally, Waterman repudiated its agreement to transport Allied's wood products aboard a third vessel. 640 F.2d at 1370, 3a; J.A. at 38a. Two vessels of U.S.S.R. registry, the "S. Kovalev" and the "S. Borudulin", scheduled to carry wood for Allied to Boston in April or early May 1980, J.A. at 39a, failed to make an appearance, presumably due to the ILA refusal.

Allied instituted the present action under LMRA §303 and filed charges with the National Labor Relations Board (NLRB), alleging in both that the ILA's conduct violates LMRA §8(b)(4), 29 U.S.C. §158(b)(4).[5]

Summary of Argument

This Court has consistently held that, absent an express mandate from Congress, union activity in a dispute with a foreign entity over foreign matters is not in commerce so as to be subject to the jurisdiction of the LMRA or the NLRB. Under the principles enunciated in *Windward Shipping* v. *American Radio Association*, 415 U.S. 104 (1974), petitioners' dispute with the Soviet Union over the invasion of Afghanistan is not in commerce. The object of the union's activity and the foreign entity's predictable responses are farther removed from the areas the Act was designed to regulate than in any of the situations previously excluded by this Court.

---

[5] A violation of LMRA §8(b)(4) provides the basis for an unfair labor practice proceeding before the NLRB under LMRA §10, 29 U.S.C. §160, and a private action under LMRA §303.

Once the original dispute is recognized not to be in commerce, the domestic effects of the union's conduct cannot, under the principles enunciated in *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1974), be split-off and made subject to the Act. There is but a single union activity with both foreign and domestic effects. Any attempt to bifurcate them at the behest of the American entities affected would be to interject the LMRA into the foreign controversy. Resolution of the "domestic" effects would necessarily resolve the foreign dispute.

The court of appeals erred by indulging in the very bifurcation which this Court has ruled is not permissible. Its rationale—that the original foreign dispute is not a *labor* dispute—finds no justification in logic nor in anything this Court has done or said. Moreover, it violates the comity considerations, which have played a major role in this Court's prior decisions, by intruding the Act and the NLRB into a dispute which involves not only foreign matters but the political policies of a foreign government.

If there is any domestic activity subject to the LMRA, it does not violate §8(b)(4). An inference of unlawful object from the necessary and foreseeable effects of the union's conduct is impermissible in this case, where the activity is equally referable to and fully explained by a lawful object. Petitioners have no primary labor dispute with any party. The activities under scrutiny are not the kind §8(b)(4) was designed to regulate. The union's motivation is admittedly political and conscientious, not economic. The approach taken by the courts in the antitrust area, of refusing to apply the Sherman Act to non economic boycotts, should be followed in the area of labor law.

In the final analysis, if there is any domestic activity cognizable under the LMRA, it is a primary dispute between the union and its employer over the scope of the

collective bargaining agreement, identical to the situation in the companion *Jacksonville Bulk Terminals, Inc.* case. Respondent should not be permitted to achieve the status of a third party beneficiary to the labor contract by forcing the case into the mold of a secondary boycott or to federalize what is really a state action for tortious interference.

To apply §8(b)(4) to petitioners' conduct would violate their First Amendment rights of free expression, free exercise, and freedom of association. It is beyond dispute that the challenged conduct was undertaken as a political protest and to refrain in conscience from servicing a wrongdoer. It was strictly limited to what was necessary to these ends. Until the decision below, the courts have been unanimous in holding that to use the LMRA to regulate First Amendment activity, no less than to use the Sherman Act, would be unconstitutional. The prospect of giving a governmental agency, the NLRB, veto power over political and conscientious activity adds to the repugnance.

Even if the court of appeals was correct on the law, it should not have granted summary judgment because issues of fact,—the union's intent, the necessary consequences of its action, and its members' desire to exercise First Amendment rights—require a trial.

ARGUMENT

I.

Petitioners' Activities Were Not in Commerce.

The terms "in commerce" or "affecting commerce" are used to describe those activities which Congress intended to fall within the reach of the LMRA and the jurisdiction of the NLRB. In a series of cases,[6] this Court has ruled that Congress intended to limit the jurisdiction of the Act as it pertains to foreign disputes.

In *Benz* the Court refused to hold preempted by the federal law a state court action to enjoin picketing of a foreign vessel by an American union over shipboard conditions affecting its foreign crew. The Court reviewed the legislative history of the LMRA and found that "[t]he whole background of the Act is concerned with industrial strife between American employers and employees." *Id.* at 143-44. The Court declined to extend coverage of the Act into foreign matters "where the possibilities of international discord are so evident and retaliative actions so certain," without "the affirmative intention of Congress clearly expressed." *Id.* at 147. In *McCulloch* it denied NLRB jurisdiction to hold an election among the foreign crewmen of a foreign registry ship. In *Incres* it upheld the right of the foreign entity to seek a state court injunction against a picketing American union seeking to organize the foreign crew. In *Ariadne* it found there was LMRA jurisdiction over the activities of an American union picketing to protest substandard wages paid by a foreign vessel to American nonunion longshore employees. The Court distinguished

---

[6] *American Radio Ass'n* v. *Mobile S.S. Ass'n*, 419 U.S. 215 (1974); *Windward Shipping* v. *American Radio Ass'n*, 415 U.S. 104 (1974); *International Longshoremen's Ass'n Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970); *Incres S.S. Co.* v. *International Maritime Workers*, 372 U.S. 24 (1963); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963); *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957).

Ariadne in that the dispute there "centered on the wages to be paid American residents." *Id.* at 199; *Windward,* 415 U.S. at 112.[7] In its latest pronouncements "recognition of the clear congressional purpose to apply the LMRA only to American workers and employers" remains the foundation of the Court's decisions. *Windward,* 415 U.S. at 110.

In *Windward* an American union engaged in "area standards" picketing of a foreign vessel in Houston to protest wages paid its foreign employees. The union urged that its activities were arguably protected by §7 of the Act, 29 U.S.C. §157, and so could not be enjoined by the state court. This Court, however, declined to limit its prior holdings. *Id.* at 113-14. Applying the principles it had evolved to determine whether activities fell within the range Congress intended to cover, the Court found that the thrust of the American union's activity was toward the foreign entities' foreign operations in that

> [v]irtually none of the predictable responses of a foreign shipowner to picketing of this type . . . would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate.

Id. at 115. It held, therefore, that the union's activities were not in commerce and that the foreign entity was not precluded from seeking relief in state court.[8]

---

[7] Petitioners do not rely on the fact that one of the parties to the dispute in this case happens to be a foreign government. Indeed, this would be untenable under *Ariadne and Mobile,* 419 U.S. at 22 n.9. Rather, it is the *character of the dispute* that determines whether or not it is "in commerce." When the dispute is over the hiring of American labor in U.S. ports, it is "in commerce," even though a foreign employer may do the hiring. When it is over the foreign vessel's relations with its foreign employees, it is not. When it is over a foreign government's invasion of a remote nation, it is more emphatically not in commerce.

[8] The *Windward* Court was not blind to reality. It expressly noted that the activities held to be not in commerce for purposes of the Act in the earlier cases "were literally just as much 'in commerce' as were the activities covered in *Ariadne.*" *Id.* at 112.

Mobile involved the identical activity that had been addressed in *Windward* but in a different port. However, in *Mobile*, the state court action was brought by an American stevedore whose longshore employees refused to cross the picket line and by an intervening American farmer who wished to transport his goods. The union claimed that its activity was arguably a secondary boycott and thus subject to the exclusive jurisdiction of the LMRA. Having already determined in *Windward* that the underlying dispute between the union and the foreign entity which gave rise to the challenged activity was not in commerce, this Court held that the effects of the same activity could not be bifurcated when complained of by the American entities. The Court ruled that inducing the longshore employees not to handle the goods was not even arguably a secondary boycott because of its foreign object. The Court refused to hold

> [t]hat there is an independent controversy between petitioner unions, representing American seamen, and the contracting stevedores represented by respondent, [and] . . . that this independent dispute is subject to the jurisdiction of the Board.

Mobile, 419 U.S. at 220-21. It did so because the response of the American employees "was a crucial part of the mechanism" by which the union's foreign objective was to be achieved. *Id.* at 224.

> The effect of the picketing . . . is precisely the same whether it be complained of by the foreign-ship owners or by persons seeking to service and deal with the ships. The fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into 'commerce' activities which plainly were not such in Windward.

Id. at 224-25.[9]

Despite its recognition that the union's activity would have effects which might semantically be described as domestic, the Court characterized the American entities which felt those effects as not, in the context of that dispute, being in commerce. *Id.* at 228.

> Since Windward held that the Houston picketing was not in or affecting commerce, it would be wholly inconsistent to now hold, insofar as concerns Board jurisdiction over a complaint by respondents, that the employer of the longshoremen who honored the picket line, or the shipper whose goods they did not handle, was in or affecting commerce.

Id. at 224.

The key to this holding was that the same union activity was generating both the foreign and the domestic effects and that the *Benz/Windward* line of cases did not "permit such a bifurcated view of the effects of a single group of pickets at a single site." *Mobile,* 419 U.S. at 222.

The applicability of *Mobile* to the case at bar is apparent if one imagines a prior, companion *"Windward"* case arising out of petitioners' challenged activities. Had the U.S.S.R. attempted to sue the ILA for interference with its contracts or to compel the ILA to unload a Russian ship berthed in an American port, the applicability of *Windward*

---

[9] In the earlier cases the particular disputes centered on shipboard conditions of alien vessels and the foreign area intruded upon would have been maritime operations. Consequently, these terms appear in the opinions as the specific instances of those matters to which the Act does not apply. However, the Court has never attempted to limit the non-applicability of the LMRA to foreign maritime concerns or foreign labor matters. Manifestly, of the sum total of human activity a great portion in addition to "foreign maritime operations" or foreign labor matters falls outside domestic American commerce.

would be self-evident.[10] No court would have barred the Russian government from the Massachusetts courts on a theory of preemption by the LMRA. The union's activities were plainly designed to influence not American matters but the foreign policy of the Soviet Union—an area even further removed from domestic commerce than business decisions or maritime operations. The foreign party's predictable response could not, even indirectly, as it might in the earlier cases, be the kind of "wage-cost decision benefiting American workingmen which the LMRA was designed to regulate." *Windward*, 415 U.S. at 115.

Thus, if as in *Windward/Mobile* the first sally had been by the foreign entity itself, the lack of LMRA jurisdiction would have been apparent. The applicability of *Mobile* to Allied's present action is also clear. Both considerations which impelled this Court not to bifurcate the foreign dispute at the behest of the "all American cast" in *Mobile* apply here.

The anomaly which impelled the *Mobile* Court to refuse to re-characterize the activity by reason of the change in plaintiffs is present in this case as well.

> Acceptance of petitioners' argument would result in a rule whereby a state court had jurisdiction over a complaint for injunction filed by a foreign-ship owner claiming that picketing activities of a union were interfering with his business relationships with a contract stevedore, but the same court would have no jurisdiction where the contract stevedore sought an injunction

---

[10] Significantly, the record discloses that at the time this action was commenced wood for Allied was destined to arrive in Boston aboard two Soviet vessels. J.A. at 39a. There was a very real potential that the hypothetical *"Windward"* case postulated here would materialise. It should be noted that this case would have presented the identical situation which the NLRB in *National Maritime Union of America (Shippers Stevedoring Co.)*, 245 NLRB 29 (1979) found not to be within its jurisdiction under the *Mobile* doctrine.

> on precisely the same grounds. The anomaly of such a result is reason enough to question it....

Mobile, 419 U.S. at 221.

Similarly, the conclusion would inevitably follow that, since the obvious object of the ILA action was to protest Soviet foreign policy, the union activity was not even arguably subject to the Act. Clearly there was in this case no dispute between the union and the American entities that was independent of its dispute with the Soviets. There was no domestic activity which could be bifurcated from the foreign activity. There was but one, unified ILA action. A single group of ILA longshoremen refused to handle Soviet goods at a single site.[11] The incidental effects complained of by the domestic entities sprang from this single activity. To the extent that the domestic impact could be said to have any purpose, it was a "crucial part of the mechanism" by which the union's foreign objective was to be achieved. The only way to prevent the domestic effects would be to end the foreign-directed activity itself.

The court of appeals below and the NLRB in the re-

---

[11] Just as the Alabama locus of the dispute in *Mobile* did not differentiate it from the same union activity in Houston, addressed in *Windward*, the fact that the ILA action manifests itself in different ports is irrelevant. So, too, the distinction that petitioners here refused to handle rather than picketed is immaterial. Both forms of activity may arguably violate the LMRA. Moreover, as recognized by the administrative law judge in the related NLRB proceeding, to distinguish this case on the basis of the refusal to handle would be simply to invite picketing as the response to the next Afghanistan. 82a. Significantly, no tribunal or litigant has attempted to distinguish the ILA action from *Windward/Mobile* on this basis.

lated unfair labor practice proceeding[12] disregard the jurisprudential approach adopted by this Court in the *Benz/Mobile* line of cases, eschew its method of analysis, and reach a result incompatible with the controlling law.

The cornerstone of this Court's decisions has been the will of Congress. It has ruled that certain activities were not in commerce and so were not subject to the LMRA on the complaint of any party because of Congress' intent that the Act be limited to American labor matters. If Congress "did not fashion [the LMRA] to resolve labor disputes between nationals of other countries operating ships under foreign law", *Benz*, 353 U.S. at 143, it certainly did not fashion the Act to resolve non-labor disputes over the political and military policies of foreign governments. This Court has consistently held that the NLRB may not assert jurisdiction even indirectly over a domestic union's grievance with a foreign employer over its labor policy on ships touching our shores. It

---

[12] Although the Board's decision is not under review here, it has been submitted to the Court. The NLRB is not entirely in accord with the court of appeals. The Board decision was 2-1 and overruled its own administrative law judge. However, in many respects the majority of the Board adopts the First Circuit's reasoning and shares its errors.

The NLRB's other reasons for finding jurisdiction are equally erroneous. One is a policy argument—that the ILA's conduct challenges American foreign policy and is national in scope and so requires the corrective action of an agency with national jurisdiction, rather than sporadic treatment under varying state laws. S.M. at 8a. This overlooks the facts that the *Windward/Mobile* activity was also multi-state and that keeping the matter out of federal courts and apart from United States policy is exactly what comity requires. *See* pp. 19-21 below.

The Board's second rationale is a wonder of tautology: the NLRB has jurisdiction because the NLRB has already found a violation. The statement that the ILA is guilty permeates the Board's jurisdictional consideration, and the earlier cases are distinguished on the basis that in those, except for *Ariadne*, there was no violation. This itself is erroneous, for *Mobile* clearly involved what would have been a secondary boycott if subject to the Act. Be that as it may, the Board makes its decision on the merits the mainspring of its power to *address* the merits.

would be anomalous to rule that the Board may assert jurisdiction over another union's altruistic activities directed at the military policies of a foreign government half a world away.[13]

The First Circuit has done what this Court has said could not be done—taken a bifurcated view of the single ILA action. Unable to say that the ILA/Soviet dispute is in any way connected with domestic commerce, the First Circuit splits off that preeminently foreign engagement and disregards it, viewing the American activity in isolation. The court of appeals could hardly deny that it was engaging in bifurcation. It employs the rationale that it is not bifurcating a *labor* dispute. It justifies this and attempts to distinguish *Windward/Mobile* by engrafting upon the earlier cases a requirement for application of their principles which was never mentioned by this Court—that the underlying foreign dispute must be a "labor" dispute.[14] Nothing in what this Court

[13] The NLRB itself has rejected the notion that the *Windward/Mobile* doctrine applies only when the foreign dispute is over labor matters. In *Shippers Stevedoring Co., supra*, the Board held that under *Windward* and *Mobile* it had no jurisdiction over the effects of an American union's refusal to service Russian vessels because of the union's belief that a United States law, the Cargo Preference Act, 46 U.S.C. §1241(b)(2), requiring that half of all cargo funded by a United States government agency be transported by American Flag vessels was being violated. While the union activity in *Shipper Stevedoring Co.* might have affected foreign maritime operations, they had nothing to do with a foreign *labor* dispute.

[14] The First Circuit's position is really another way of saying *Windward/Mobile* should be limited to almost the same fact patterns they confronted. The NLRB would go further and limit the decisions to identical situations involving "foreign maritime operations". S.M. at 23. The manifest fallacy of this approach is that it overlooks the fact that the earlier cases turned upon the characterization of the disputes involved as being not in commerce. By limiting their application to situations which involved "interference in the management or affairs of foreign companies, workers or labor organizations", 640 F.2d at 1374, 12a, the First Circuit is by necessary implication including within the area of domestic commerce a literal multitude of matters not yet addressed by this Court, no matter how foreign their object or effect.

did or said justifies such limitation.

The First Circuit, with the Board's concurrence, S.M. at 10a, expressly recognized the lack of NLRB jurisdiction to resolve the underlying foreign political dispute. 640 F.2d at 1372-73, 9a-10a. However, it held that the absence of a foreign *labor* dispute permitted the domestic effects to be segregated and made subject to the Act. 640 F.2d at 1374, 13a. This disregards the method of analysis employed in and mandated by *Mobile*—a method which was apparent to the dissenting judge, to the NLRB in *Shippers Stevedoring Co.*, to the Fifth Circuit in *Baldovin*, and to the First Circuit itself in *Walsh*. That analysis has two steps. First, it characterizes the underlying dispute to determine whether it is "in commerce" by examining the object of the union activity and considering whether the foreign entity's response can affect areas the Act was designed to regulate. If it is not, the second step inquires as to whether the domestic effects can be split off and said to be an independent dispute subject to regulation under the Act. This inquiry has nothing to do with the nature of the foreign dispute except that it is *not* in commerce.[15]

In the instant case the concession that the Act's jurisdiction does not extend to the ILA/Soviet dispute because it is foreign is consistent with the *Windward* analysis.[16] Where the First Circuit errs is in the *Mobile* analysis. Having correctly characterized the underlying dispute, the

---

[15] Thus, the First Circuit correctly held in *Walsh* that "the question of jurisdiction turns on the nature and location of the underlying dispute," 630 F.2d at 874, and recognized that under *Mobile* "the Board could not exercise jurisdiction over a secondary boycott where the primary dispute was outside its jurisdiction." *Id.* at 874-75 n.13.

[16] Plainly, concern over the threat of *indirect* NLRB intrusion into the foreign dispute runs through the *Benz/Mobile* line. The fact that there is no labor dispute at all, but a political one, is all the more reason why it should not be subject to regulation by the labor Board.

court of appeals blatantly isolates the domestic effects. It justifies this split-off precisely by first *employing* bifurcation and then affixing the labels "labor" and "political" to the bifurcated prongs. It finds an "all American cast" by the very device of segregating and disregarding that prong which involves the foreign entity. In creating its *dramatis personae*, the First Circuit simply disregards the plain language of this Court:

> Petitioners interpret Windward as having done nothing more than establish that the maritime operations of foreign ships are not 'in commerce.' They assume that Windward said nothing about either the business activities of persons seeking to deal with such ships, or about whether, for these purposes, those activities are 'in commerce' or 'affecting commerce.'
>
> • • •
>
> Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act.

Mobile, 419 U.S. at 221, 228.

In fact there was but one ILA activity with inextricable foreign and domestic effects. The union was not doing anything to the American parties that could, in its purpose, accomplishment, or effect, be divorced from what the union was doing vis-a-vis the U.S.S.R. It is impossible to point to a single act of the union affecting a domestic party that was not aimed at the Soviets, which might be segregated and made the subject of an independent dispute. The First Circuit's creation of the requirement of a foreign labor objective was but an excuse to indulge in the very bifurcation *Mobile* does not permit.

Both the First Circuit and the NLRB would infer the unlawful object towards neutrals, which is necessary to violate §8(b)(4), *solely* from the "necessary and foreseeable consequences" on the American entities of the union's refusal to service the Russians. 640 F.2d at 1375-76, 16a-18a; S.M. at 32a-34a.[17] This creates an unresolvable dilemma for both tribunals when it comes to the jurisdictional question. If the effects on American neutral entities flow directly and inescapably from the activities vis-a-vis the Russians, these effects cannot be separated from their foreign involvement and made the subject of an independent dispute.[18]

Under the decision below, if the ILA's dispute with the Soviets had been a "labor" dispute, bifurcation would not have been possible and the union activity would not be subject to the LMRA. Had the ILA couched its grievance in terms of lower wages paid to Russian workers or the use of Gulag slave labor in longshore activities at the other port, the Act would not apply. Yet the "all American" dispute, its participants and effects, would be identical. These are in no way affected by whether the union's ire with the Soviets is over labor matters or military matters. By singling out motivation as the fulcrum to permit bifurcation the First Circuit creates the disquieting situation that the union may be subject to LMRA jurisdiction for the very reason that its foreign dispute is both political and conscientious. *Mobile* says the LMRA may not be the vehicle for affecting matters of foreign commerce. The First Circuit says it may be the vehicle for affecting matters of foreign politics and conscience.

---

[17] The Board states: "The ILA can affect the USSR's stance on Afghanistan, if at all, only through an effective nationwide boycott of Russian cargo." S.M. at 8a.

[18] The Board's administrative law judge perceptively noted that "[i]mputing such secondary intention to the union can not be done without also imputing an intention to have an impact on foreign trade." S.M. at 98a. The more inevitable the domestic effects, the more they are a "crucial part of the mechanism" by which the union's foreign objective is to be achieved.

The First Circuit's denigration of the comity aspects of this case by focusing solely on interference by the NLRB misunderstands and oversimplifies this Court's comity considerations.[19] The seminal decision, *Benz*, does not mention the NLRB at all. Rather, it was the Act itself that was not intended by Congress to be intruded into foreign matters. *Benz*, 353 U.S. at 142-44. In *Windward* the Court reiterated "its reluctance to intrude *domestic labor law* willy-nilly into the complex of consideration affecting foreign trade." *Windward*, 415 U.S. at 110. (emphasis supplied). In none of the cases where this Court has invoked comity, with the exception of the *McCulloch* election case, was it contemplated that the NLRB would step in and actually attempt to dictate resolution of the underlying foreign dispute, whether labor or otherwise.

The practical result of NLRB jurisdiction in a §8(b)(4) proceeding must always benefit the foreign entity, for while the Board cannot make it comply with the union's demand, the Board can, by finding a violation, remove the inconvenience of the union's action. Undoubtedly, in the present case the Kremlin would applaud the NLRB's decision no less than it would the First Circuit's. But the foreign entity's pique or pleasure at the result is not the crux of the comity question. In *Benz*, as in *Windward/Mobile*, it was not suggested that the NLRB would direct the foreign entity to pay higher wages or improve shipboard conditions.[20] The possibility of NLRB intrusion, then, is not the sole antagonism to comity which

[19] The court of appeals repeats that this case involved "no question of interference in the affairs of a foreign employer." 640 F.2d at 1372, 1374, 9a, 12a. (emphasis supplied). It need hardly be said that NLRB interference with a foreign nation's affairs other than labor matters could equally, indeed more abrasively, run afoul of comity considerations.

[20] Similarly, in *Shippers Stevedoring Co.*, the NLRB itself never contemplated enforcement of the provisions of the Cargo Preference Act.

has concerned this Court. This is underscored by the repeated reference in the controlling decisions to interference by the *union* or from the effects of its activities. *Mobile*, 419 U.S. at 222, 223, 224, 228; *Windward*, 415 U.S. at 112, 113, 115, 119; *Ariadne*, 397 U.S. at 199, 200.

Comity dictates that a dispute involving a foreign entity over foreign matters not be made into a federal case. The doctrine of preemption presupposes that a matter is so much of national concern as to preclude the states from acting. *San Diego Building Trades Council* v. *Garman*, 359 U.S. 236, 240 (1959). To invoke this doctrine would be to force the foreign entity to litigate its claim within the narrow structure of the LMRA while denying it access to the state courts with their full panoply of common law rights and remedies. The intrusion of the NLRB, while not determinative, certainly aggravates the situation, for there is always the possibility that the Board will rule in favor of the union.[21] This would not require the foreign entity to accede to the union's demand. But it would have the perceived effect of putting the *imprimatur* of an agency of the United States on the union's action. Moreover, any refusal by the Board to find a violation would leave the foreign entity without a remedy, for access to state court is denied when LMRA jurisdiction is upheld.

In this context, the suggestion of the Solicitor General that the outcome might "be viewed by other nations as reflecting an extension of United States foreign policy", Amicus Brief in *JBT* at p. 26, n.17, egregious as this is as a basis for arranging the outcome of private litigation, has some validity. Comity is served by keeping the United States, its courts or administrative agencies, out of the picture and allowing the controversies to be resolved at the contractual, arbitral or state court level. It requires that

[21] Obviously, this was the expectation of the union petitioners in the earlier cases who argued *for* Board jurisdiction.

the claim of foreign entities arising out of disputes about their foreign affairs not be made the sole province of the federal government, to be litigated under the limited scope of a federal labor statute.

The reliance by both the First Circuit and the NLRB on the *Grain Elevator* decisions[22] is misplaced. Once the applicability of the *Windward/Mobile* holdings is seen, these earlier lower court decisions can hardly take precedence over later Supreme Court holdings. The footnote in *Mobile*, 419 U.S. at 225, n.10, may not be the pretext for disregarding a thoroughly briefed and carefully reasoned opinion by the highest Court. Nor need one go as far as Judge Aldrich and the administrative law judge and question the *Mobile* dictum. The *Grain Elevator* cases are quite distinguishable from both *Mobile* and the case at bar.[23] Indeed, the distinguishing factor pinpoints the error of the First Circuit and the Board in finding LMRA jurisdiction in this case.

In *Grain Elevator*, a Canadian union disputing with its Canadian shipping employer induced an American union not to handle for its American employer goods destined for the Canadian employer's ships. The American union was not involved in the original Canadian dispute at all. It never claimed to be a party to any underlying dispute over a matter not within domestic commerce. It claimed only to be honoring first an actual picket line and later what it conceived to be a phantom picket line of the Canadian disputant union. The Canadian union might have been content to

---

[22] *Madden* v. *Grain Elevator Workers Local 418*, 334 F.2d 1014 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965); *Grain Elevator Workers Local 418* v. *NLRB*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967), *enforcing Grain Elevator, Flour and Feedmill Workers, (Continental Grain Co.)*, 155 NLRB 402 (1965).

[23] It should be noted that the *Grain Elevator* cases do not well serve the First Circuit's purpose. In those cases, as the court of appeals was aware, the underlying dispute *was* a labor dispute. 640 F.2d at 1372-73, 9a-12a. Lack of a foreign labor dispute, then, can hardly have been the reason for this Court's distinguishing those cases from *Mobile*.

press its cause entirely at home. Instead, it opened a second front in the United States. The conduct complained of was the activity here, and the issue was what was the object of this added American activity.[24]

In *Grain Elevator* the object of the Canadian union's American activity was only an adjunct to its original dispute, to involve the American entity so as to exert *added* pressure. Thus, the American activity was independent of the Canadian activity. It was capable of bifurcation and resolution without intrusion into the foreign dispute. It did not, like *Windward/Mobile* and the present case, involve a single union response which simultaneously had an impact on both the foreign and American entities, resolution of which at the behest of one would necessarily put an end to the activity with respect to the other. The American activity was susceptible of resolution without in any way determining the Canadian dispute. In *Mobile* terminology, the American activity was not "a crucial part of the mechanism" by which the Canadian object was to be accomplished. Despite the § 10(*l*) injunction and the Board's cease and desist order, the Canadians' dispute could, and did, go on. True, one additional weapon in the arsenal of the Canadian union was denied it, but resolution of the American dispute was not conclusive as to the foreign dispute.[25]

In *Mobile* and the instant case, the interdependency of results precludes the bifurcation that was appropriate in *Grain Elevator*. The union here was not involved in dis-

---

[24] The NLRB decision disposed of the jurisdictional issue in a footnote. 155 NLRB at 403, n.6. The decision itself is devoted to the "movable situs" doctrine and the possibility of a "phantom" picket line.

[25] How crucial the challenged union activity may be to its foreign objective necessarily depends upon the facts of each case. The Fifth Circuit is correct in saying "no bright line" can be drawn. *Baldovin*, 626 F.2d at 453, n.5. The present case, however, like *Mobile*, is at the far end of the spectrum. There is but one union activity, which, if removed, is removed altogether.

parite activities in different locations. Here, as in *Mobile*, there was but a single union activity which had simultaneous domestic and foreign effects. Any splitting off and resolution of the domestic effects, under the pretext of finding an independent American controversy, would necessarily resolve the dispute and end the activity which under the *Windward* analysis is conceded to be foreign. In every theoretical and practical sense, the LMRA would be used to resolve foreign matters never within the contemplation of Congress.

To affirm the First Circuit's decision would be to overrule *Mobile* and to adopt the position of its dissent. *Mobile*, 419 U.S. at 226. Such a reversal after a mere eight years would shatter *stare decisis*. It would also involve judicial usurpation, for the cornerstone of the cases from *Benz* onward has been the will of Congress. The lack of an express mandate impelled this Court to find no LMRA jurisdiction in *Benz*. The Court reiterated its position in *Windward*, noting Congress' seventeen year silence. *Windward*, 415 U.S. at 111. Since *Mobile* seven more years have passed and Congress has not expressed the clear affirmative intention which this Court has insisted is the prerequisite to intruding the LMRA into foreign affairs.

It is the inescapable fact that in the decisions from *Benz* to *Mobile* this Court declined to find LMRA jurisdiction when it was sought by a union. For the Court now to do an about face, when the union is urging that the Act does not apply, would compromise the principle of equal justice. Whether or not Allied's remedy, if any, lies under the Act or in state court is simply not worth that compromise.

II.

Petitioners' Conduct Did Not Violate §8(b)(4).

Having bifurcated the Soviet dispute to avoid the strictures of *Mobile*, the First Circuit proceeds to construct a violation of § 8(b)(4) from the union's conduct, frankly admitting its decision is "a fortiori." However, once the Russian dispute is split off, necessary ingredients of a secondary boycott disappear as well.[26] The First Circuit's finding of a violation should be reversed on several grounds.

A. *The Unlawful Object, Essential to a Violation of § 8(b)(4), Cannot Be Made Out.*

For a union's conduct to violate § 8(b)(4) "an object must be to force or require their employer or another person to cease doing business with a third person." *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93, 98 (1958). To find an unlawful object, both the court of appeals and the NLRB were required to fall back upon an a priori approach which amounts to a presumption of guilt. The First Circuit held that, since the refusal to handle goods "a fortiori" forces an employer to cease doing business with the source of those goods, "it is difficult to say that the cessation of business is not at least *an* object of the union order." 640 F.2d at 1375, 16a (emphasis in the original).

The fallacy of this reasoning is that it deletes the requirement of an unlawful object from the Act. As this Court has

---

[26] Having, for jurisdictional purposes, purported to find an independent dispute capable of bifurcation, both the First Circuit and the NLRB cannot avoid reintroducing the U.S.S.R. in order to find a violation. Their approach parallels that of the petitioner in *JBT*, who emphasized the ILA/Soviet controversy to argue that there was no labor dispute, then ignored it to argue that the dispute was arbitrable. *See JBT* Respondents' Brief, at 9. Although this approach may be necessary for an advocate, an adjudicatory tribunal is precluded by logic and justice from basing two essential elements of its decision upon mutually exclusive hypotheses.

interpreted the statute, § 8(b)(4) requires *both* the prohibited activity *and* the wrongful object.[27] The First Circuit would find the violation from the activity alone. Manifestly, every strike has as its "necessary and foreseeable consequence" cessation of the employer's business. Under the First Circuit's construction, all strikes would be unlawful.

The court of appeals' error here is one of common sense. It raises every necessary incident of an act to the level of a purpose.[28] One cannot deny that the *effects* are present, but this, without more, does not warrant one to jump to the conclusion of an unlawful object. The First Circuit and the NLRB claim the right to arbitrarily place an unlawful construction on the union's acts without a jot of evidence beyond the effects themselves, which are equally referable to a lawful intent.[29] This renders subparagraph (B) of § 8(b)(4) redundant. Since every refusal to handle must have the necessary and foreseeable consequence, it becomes superflu-

---

[27] *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 685-90 (1951).

[28] Application of this principle to other aspects of this case demonstrates the fallacy. If Clark had been patriotically motivated to cease handling Soviet cargo, this would undoubtedly have cut its volume of business and caused layoffs among its employees. But no one would suggest that Clark's *object* was to cause the employees to lose work. A direct effect of the ILA refusal to service the U.S.S.R., fully as inevitable as the impact upon any employer, was a loss of wages to longshoremen. Under the First Circuit's reasoning, one would be bound to say that "an object" of the union's action was to lose money for its members.

[29] The findings of every court as to the carefully circumscribed nature of the union's activity, of which the First Circuit was not unaware, *see* 640 F.2d at 1380, 26a, as well as the evidence submitted in opposition to respondent's motion for a preliminary injunction in this case—all tend to negate any inference that the union's object was other than as claimed: a simple desire not to be involved in traffic with the Soviets. If one assumes *arguendo* that this is true, the facts of this case would not be changed one whit. One cannot envision how this lawful object could be pursued without somehow affecting third persons.

ous for the Act to require the additional element that this be one of the union's *purposes.*

This is not to say that the common law rule of circumstantial evidence has no place in labor law. *Cf. NLRB* v. *Retail Stores Employees Union, Local 1001,* 447 U.S. 607 (1980). It is only to say that the probative value of the effects must be considered in the light of the evidence as a whole. The inference cannot be elevated to the level of an irrebuttable presumption—an "a fortiori" violation.[10]

Moreover, the political and conscientious context of the present case seriously undermines the inferential value of the effects of petitioners' conduct. In the world of economics the inference is credible because commercial activity is undertaken by reason of its expected results. In the realm of conscience this is not necessarily so. A person sometimes acts according to his conscience, regardless of the practical consequences.

> In the political boycott setting, by contrast, the assumtions underlying the economic model do not necessarily apply. An individual who refuses to deal for political reasons may be indifferent to whether others pursue a similar course of action. . . . [H]e might simply feel strongly enough about his grievance to register his protest alone.

Comment, *Political Boycott Activity And The First Amendment,* 91 Harv. L. Rev. 659, 689 (1978). The consequence of action, then, may be irrelevant where, both as protest and as conscientious abstention, the conduct is undertaken for its

---

[10] By granting summary judgment on petitioners' motion to dismiss, the First Circuit precluded the union from presenting to the trier of fact evidence to rebut any inference that might be drawn from the effects of its action. *See* pp. 35, n.47, 43-45 below.

own sake without hope of practical effect.[31]

That the First Circuit and the NLRB have done no more than presume a violation is clear when one considers that the inference they would adduce from "necessary and foreseeable consequences" is untenable with respect to three of the four parties to whom they apply it. Petitioners' refusal to handle inevitably affected Clark, but that is as far as necessity goes. The record shows, J.A. at 14a, 37a, 39a, 41a, 47a—and the court of appeals was aware, 640 F.2d at 1370, 3a—that, after the ILA refused to handle Russian goods, Allied and Waterman transported goods from the U.S.S.R. to the United States via the port of Montreal, where the ILA action did not apply. J.A. at 61a. Thus, it is false to say that the inevitable consequences of the ILA's conduct was to force Allied and Waterman to cease doing business with each other and/or to force others to cease doing business with the Soviets.[32] That business could have continued without the participation of American longshoremen.[33] The only

---

[31] The ILA is not so naive as to believe that its protest will be heeded or that its action will succeed in reforming the Soviets, where more powerful forces have not availed. In announcing the grain embargo, President Carter said:

> We anticipate that this withholding of grain to the Soviet Union will not force them to withdraw their troops from Afghanistan. We understood this from the beginning. We don't think that economic pressure or even condemnation by the United Nations of the Soviet Union will cause them to withdraw their troops.

Weekly Compilation of Presidential Documents, Vol. 16, No. 2, Monday, January 14, 1980, at 42.

[32] The NLRB is satisfied with a shotgun approach, wherein the ILA is found to be forcing everyone to stop doing business with everyone. "The object of this inducement, encouragement and coercion was to force each of the neutrals to cease handling goods emanating from Russia and to require Clark, Waterman, and Allied to cease doing business with each other." J.A. at 33a n.43. *See also* the Board's Conclusions of Law, J.A. at 37a-38a.

[33] That Waterman or the U.S.S.R. seized upon the ILA action as a pretext for cancelling prior commitments is not a necessary or foreseeable consequence of the union's conduct.

entity upon which the ILA's action could have an inevitable effect was its own employer.

B. *There Can Be No Violation of § 8(b)(4) Without a Primary Labor Dispute.*

This Court has recognized that Congress enacted §8(b)(4) out of "concern over the involvement of third parties in labor disputes not their own." *NLRB* v. *Local 825, Operating Engineers,* 400 U.S. 297, 302 (1971). Both the First Circuit and the Board repeatedly insist—and rightly so, *see JBT,* Respondents' Brief at 4, 25-27—that the ILA has no dispute with Clark, Waterman and Allied.[34]

All the decided authority would require a primary labor dispute as a prerequisite to a secondary boycott. *NLRB* v. *International Longshoremen's Association (Ocean Shipping),* 332 F.2d 992 (4th Cir. 1964); *Danielson* v. *Fur Dressers,* 411 F. Supp. 655 (S.D.N.Y. 1975).[35] No honest

---

[34] By limiting the scenario to an "all American cast," as a prerequisite to jurisdiction, the First Circuit has composed a drama where the cast is comprised entirely of neutrals. 640 F.2d at 1374-75, 1377, 1379, 14a, 19a, 23a; S.M. at 14a, n.20, 28a. But without the ILA/Russian dispute there is nothing for the American entities to be neutral with respect to. Thus, the essence of a secondary boycott—the involvement of a neutral in a dispute not his own—is precluded by the very finding necessary to invoke jurisdiction of the Act. This Court has said that the test of a secondary boycott is whether the union's pressure is "calculated to satisfy union objectives elsewhere." *National Woodwork* v. *NLRB,* 386 U.S. 612, 644 (1967). But the First Circuit and the Board must disregard the "elsewhere" in this case—for that is unquestionably across the sea and not "in commerce."

[35] Although the weight of dictum would seem to be contra, in all the cases cited by the First Circuit and the Board for the proposition that a primary labor dispute is not necessary, primary labor disputes were apparent from the facts before the courts. *See* 20a; S.M. at 122. This Court's language in *National Woodwork, supra,* quoted by the Board at S.M. at 113, is taken out of context. The Court was addressing the issue of whether the object of an agreement was work preservation or work acquisition. It did not purport to decide whether a primary labor dispute is an element of a §8(b)(4) violation.

appraisal of this case can say that the ILA has a labor dispute with any person, except possibly its struck employers.

C. *Petitioners' Conduct Was Not the Kind of Activity § 8(b)(4) Was Enacted to Prevent.*

Contrary to the First Circuit's approach, which would seem to require express legislative *permission* for union action, 640 F.2d at 1378, 21a, this Court has said:

> Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of 'secondary boycotts' and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in §8(b)(4)[(B)]. The section describes and condemns specific union conduct directed to specific objectives.

United Brotherhood of Carpenters & Joiners v. *NLRB*, 357 U.S. 93, 98 (1958).

The Court has repeatedly affirmed that the LMRA is concerned with the *economic* relationship between employer and employee.[36] There is nothing in the Act's legislative history or language to suggest that it was designed to be used as a tool for resolving matters that have nothing to do with labor relations.

Behind the decisions which require a primary labor dispute for a violation of §8(b)(4) is the awareness that the secondary boycott proscriptions are out of place when applied to a non-labor situation.[37] The district courts take a

---

[36] *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972); *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970); *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395 (1952); *NLRB* v. *Bradford Dyeing Ass'n*, 310 U.S. 318 (1940); *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956).

[37] The First Circuit itself was troubled by "[t]he elusiveness of any attempt to fit aspects of this rather unique case comfortably within the traditional categories of labor law . . . ." 640 F.2d at 1372, n.3, 9a, n.3.

similar approach in cases where unions attempt to remove to federal court, under the aegis of LMRA §303, disputes which involve tortious activity under state law. Where the dispute is not over *labor* matters, plaintiffs are left to their remedies in state court, notwithstanding that one of the parties is a labor union.[38] *Big Apple Supermarkets* v. *Dutto*, 237 F. Supp. 774 (E.D.N.Y. 1965); *Jody Fair Inc.* v. *Dubinsky*, 225 F. Supp. 695 (S.D.N.Y. 1964); *Vincent Ingino Inc.* v. *Certified Preferred, Inc.*, 222 F. Supp. 109 (E.D.N.Y. 1963). *Contra, Roywood Corporation* v. *Radio Broadcast Technicians*, 290 F. Supp. 1008 (S.D. Ala. 1968).

These labor law holdings are buttressed by numerous decisions in the analogous antitrust area, where the courts, relying on this Court's recognition that Congress intended that the Sherman Act's proscriptions be limited to "commercial transactions," *Apex Hosiery* v. *Leader*, 310 U.S. 469, 493 (1940), have refused to apply the antitrust laws to boycotts that were not economically motivated because "the conduct alleged is simply not the kind the Sherman Act was designed to regulate." *Miller & Son Paving Inc.* v. *Wrightstown Township Civic Association*, 443 F. Supp. 1268, 1271 (E.D. Pa. 1978), *aff'd*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979); *Missouri* v. *National Organization for Women, Inc.*, 467 F. Supp. 289 (W.D. Mo. C.D. 1979), *aff'd*, 620 F.2d 1301 (8th Cir. 1980); *Crown Central Petroleum*

---

[38] The reasoning of these courts has been expressed as follows:

> The prime object of the defendants' acts as alleged in the complaint is an intentional purpose to inflict injury and damage upon the plaintiff without legal justification in order to compel it to pay a debt for which it is not legally liable. The circumstance that the means employed to achieve that objective happen to parallel conduct condemned as an unfair labor practice does not change the essential nature of plaintiff's cause of action.

Judy Fair Inc. v. *Dubinsky*, 225 F. Supp. at 698.

Corp. v. *Waldman*, 486 F. Supp. 759 (M.D. Pa. 1980).[39] The First Circuit itself has adopted this view. *Council for Employment and Economic Energy Use* v. *WHDH Corp.*, 580 F.2d 9 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979).[40]

So in the case at bar, finding no economic or labor objective in the union's conduct, this Court should decline to impress the LMRA onto what is an essentially non-labor situation.

D. *The Only Feasible Labor Dispute Is With Petitioners' Employers.*

Whether or not one closes one's eyes to the dispute with the Soviet Union, it is clear that the only rational labor-related activity in this case is between petitioners and their employer. The ILA has no labor relations with Allied or Waterman. It has no economic dispute with either. Its conduct bears directly on Clark, and the inference upon which the First Circuit depends to find a violation can be made only with respect to Clark.

The accurate characterization of this case under the LMRA, then, is as a dispute between the union and its employer over what work is required by their collective bargaining agreement. As the Solicitor General noted in *JBT*, the inclusion in a labor contract of a conscience clause permitting the union to decline morally repugnant work would be entirely appropriate.[41] *JBT*, Amicus Brief

---

[39] In each of these cases all the elements of a *per se* antitrust violation were present. No less than in the present case, the boycott's effects were felt in the marketplace, and it was the conscious intent of the participants to put *economic* pressure on the boycotted entities.

[40] Indeed, the First Circuit had no difficulty in dismissing Allied's Sherman Act count on the grounds that the ILA's motive was not economic. 640 F.2d at 1380, 26a.

[41] This is not to say that the controversy with the employer in *JBT* is merely over work assignment, as the Solicitor suggests in that case. Rather, it is a resulting dispute over the scope of the no-strike clause itself. *See JBT*, Respondent's Brief at 21-25.

at 26, n.17. Whether or not the ILA is required to handle goods tainted by a dispute which cannot be resolved by arbitration has already engendered extensive litigation. There is good authority that, even without a conscience clause, the ILA collective bargaining agreement permits the union's conduct because its no-strike provision is coterminous with its agreement to arbitrate, thus allowing the union to strike over matters that cannot be arbitrated.[42] That neither Clark nor the Boston Shipping Association have exercised the right to seek arbitration of this question, J.A. at 29a-30a, does not give Allied license to call the situation a secondary boycott.

E. *This Court Should Not Permit Federalization of What Is Essentially a State Claim.*

When one remembers the *JBT* case, it is apparent that Allied in the case at bar is seeking to make itself a third-party beneficiary of Clark's contract with the ILA. This is not possible under LMRA §301, 29 U.S.C. §185; *Isbrandtsen Co. Inc.* v. *Local 1291, International Longshoremen's Association,* 204 F.2d 495 (3d Cir. 1953).[43] So Allied postures the case as one under §303.

Similarly, any claim Allied may have directly against the ILA sounds in tortious interference with contract. Clearly, Allied has no *labor* interest in the matter. Its interest is to have its contracts performed. Nor has the union any economic dispute with Allied. Under the decisions cited at p. 30 above, there can be little doubt that, if Allied had elected to press its tort claim in the

---

[42] This would seem to be the First Circuit rule. *See, NLRB* v. *C.K. Smith & Co., Inc.*, 569 F.2d 162 (1st Cir. 1977), *cert. denied*, 436 U.S. 957 (1978). *See also, JBT* Respondents' Brief at 32, n.29.

[43] *See also, JBT*, Amicus Brief at 17, n.12, where the Solicitor General agrees that only a party to a collective bargaining agreement may sue under §301. The Solicitor General excuses the participation in *JBT* of Occidental and Hooker (the analogues to Allied in this case) on the grounds that Jacksonville Bulk Terminals, Inc. was their subsidiary.

Massachusetts courts and the ILA had attempted to remove it to federal court under §303, the district court would have remanded to the state court. Conversely, Allied should not be permitted here to disguise its essentially state tort action to invoke the LMRA."

III.

Petitioners' Conduct Is Protected by the First Amendment.

A. *First Amendment Rights Are at Stake in This Case.*

Petitioners' refusal to engage in morally reprehensible activity, with its dual objectives of satisfying the demands of conscience and protesting aggression, is thrice protected by the Constitution.

Within the express guarantee of free speech is the right to proselytize political and ideological causes, *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), and to communicate social, political or philosophical messages. *Young* v. *American Mini Theatres*, 427 U.S. 50 (1976); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). Expressive conduct, *see, e.g., Tinker* v. *Des Moines*, 393 U.S. 503 (1969), as well as the right to remain silent or inactive as a symbolic form of communication is protected by the First Amendment. *Spence* v. *Washington*, 418 U.S. 405 (1974); *Brown* v. *Louisiana*, 383 U.S. 131 (1966); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957).

The right of conscience is implied from the free exercise clause. *See, e.g., Gillette* v. *United States*, 401 U.S. 437 (1971); *Welsh* v. *United States*, 398 U.S. 333 (1970); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). In defining the area of "conscience" this Court has rejected a rigidly theistic definition, *Toraso* v. *Watkins*, 367 U.S. 488 (1961),

---

" The suitability of a state tort claim for weighing the merits of this case with its First Amendment dimensions is discussed at p. 43, n.63 below. The consistency with *Mobile* need not be belabored.

and has required only a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that fulfilled by . . . God . . . ." *United States* v. *Seeger*, 380 U.S. 163, 176 (1965). The distinguishing characteristic of conscience is its reliance on "moral, ethical or religious beliefs about what is right and wrong" as opposed to mere "considerations of policy, pragmatism, or expediency." *Welsh* v. *United States*, 398 U.S. 333, 342-43 (1970).

In the case at bar it is admitted that the union's conduct is not selfish or economic, but rather to protest the Soviets' aggression. Every tribunal and litigant has recognized this communicative and political nature of petitioners' activities. The conscientious dimension has yet to be adequately considered but is beyond serious dispute.[45]

That military aggression against a weaker neighbor should inspire moral revulsion is self-evident. The ILA's was but one voice in a worldwide chorus of outrage at the Soviets' wrong. The refusal to contribute even indirectly to the evildoer's malfeasance is a basic ethical response.[46] The degree of involvement which would be wrong necessarily depends upon the subjective view of the actor. But the absten-

[45] The First Circuit avoids the union's claim of conscience. Citing a series of "refusal to handle" cases, it asserts that in each the union could have claimed that the work was "repugnant" to its members. 640 F.2d at 1375, 15a-16a. This cynical attitude hardly befits treatment of a serious constitutional issue. Each case cited involved a traditional labor dispute. The union's motivation was unmistakably economic. An attempt to invoke conscience would have been a transparent subterfuge. *Cf. California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). But here, as every court agrees, the ILA had *no* economic purpose. Its conduct was inspired solely by outrage at the Soviet aggression. Longshoremen had nothing to gain and everything to lose by their abstention. Both their motivation and their refusal to be involved with the aggressor are genuinely within the realm of conscience.

[46] To aid or abet a criminal makes one an accessory. 18 U.S.C. 2. Giving aid or comfort to the enemy is the essence of treason. 18 U.S.C. §2381.

tion from what is perceived to be wrong is the primary command of conscience not to do evil.

The shelter of the First Amendment extends to labor unions and their members, *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). It is no longer open to question that a labor union's right to engage in communication, *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217 (1967), and political activity, *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), is constitutionally protected.

The union may also assert a right of conscience on its own and its members' behalf.[47] The First Circuit and the Board would seem to concede the right of individual union members to engage in First Amendment activities, but would deny it to the union as an organization. 640 F.2d at 1379, n.11, 23a, n.11; S.M. at 30a, n.38.[48]

---

[47] The First Circuit disputes the ILA's consistent assertion that its conduct is the will of the membership. 640 F.2d at 1379, n.11, 23a, n.11. The impropriety of this as a basis for summary judgment, when the defendant has not had an opportunity to present its case and when what evidence there is corroborates its assertion, is manifest. At a trial petitioners are prepared to introduce evidence that, even before the International took a position, longshoremen in Boston refused to handle Allied's Russian wood; that for two weeks prior to President Gleason's announcement the International was bombarded with communications from local leaders conveying the desire of their rank and file not to service the Soviets and requesting the union leadership to take a position; that the ILA did not act until it had ascertained the sentiments of an overwhelming portion of the membership; and that the International's involvement was a desire to keep the situation under control, to prevent wildcat strikes, and to protect the longshoremen in the exercise of their rights. *See* J.A. at 59a, 60a. The NLRB's Administrative Law Judge discounted the fact that the Russian policy originated with the rank and file. This was not inappropriate in the §8(b)(4) "inducement" context he was considering. The ILA certainly "encouraged" its members in the stance they had taken by backing them. For First Amendment purposes, however, the genesis of the union's stance is crucial and is capable of proof.

[48] The NLRB's sole rationale for sweeping aside First Amendment considerations—that they were carried out in concert, S.M. at 30a, n.38—presupposes that, when constitutional rights are exercised in association with others, they are forfeited.

The right of an association to assert on behalf of its members a right personal to them has been repeatedly recognized by this Court.[49] No sound basis exists for denying this principle when the association is a labor union. Once it is recognized that the individual members possess a protected right, it follows that these rights may be exercised in association with others. To deny this liberty would itself violate the First Amendment. *Shelton* v. *Tucker*, 364 U.S. 479, 485-86 (1960).

Like other associations unions derive their First Amendment right from the rights of their members. Therefore, when the union's rights are abridged, its members' rights are abridged as well.[50] It is not the ILA or Local 799 that must actually engage in the unconscionable activity. It is the individual longshoremen. The union, then, has a right

---

[49] *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975); *NAACP* v. *Patterson*, 357 U.S. 449 (1958); *NAACP* v. *Button*, 371 U.S. 415 (1963); *International Union, etc.* v. *National Right to Work*, 590 F.2d 1139 (D.C. Cir. 1979). *See also Investment Co. Inst.* v. *Board of Governors of the Fed. Reserve Sys.*, 606 F.2d 1004 (D.C. Cir. 1979); *American Jewish Congress* v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978); *Socialist Workers Party* v. *Hardy*, 480 F. Supp. 941 (E.D. La. 1977); *Socialist Workers Party* v. *Attorney Gen. of the United States*, 463 F. Supp. 515 (S.D.N.Y. 1978).

[50] The manner in which the association decides when and how to exercise its members' rights is a matter of internal procedure. The union may be challenged under its own operating charter. Moreover, union members also have a First Amendment right to refuse to participate in the political activities of their union, and there exists an appropriate remedy personal to each such member, apart from the LMRA. *See Abood* v. *Detroit Bd. of Educ.* Petitioners have not compelled their members to follow a particular course of conduct; rather, the members themselves have set the course which the union has officially enunciated as its policy. The suggestion that a vote was required, instead of the informal canvas actually conducted, finds no justification in law. The duly elected leadership of the union is presumed to speak for the membership unless challenged. One could as well require a referendum before the union exercised its First Amendment rights to endorse a piece of legislation or a political candidate. *Cf. Abood* v. *Detroit Bd. of Educ.*

of conscience in the same manner it has rights of speech and political activity, derivatively from its members.[51]

B. *To Hold That Petitioners' Conduct Violates §8(b)(4) Would Contravene the First Amendment.*

The argument that petitioners' conduct is not of the kind Congress intended to regulate under §8(b)(4) takes on added force under the First Amendment. Not only was petitioners' conduct non-economic, it was the kind of conscientious, expressive and political activity that is protected by the Constitution. As the Sixth Circuit has observed:

> Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment.

NLRB v. *Ford Motor Co.*, 114 F.2d 905, 914 (6th Cir.), *cert. denied*, 312 U.S. 689 (1940).[52] Rather, First Amendment rights are basic tenets of federal labor policy. *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974); *Southwire Co.* v.

---

[51] Increasingly, the courts are recognizing that beliefs and scruples may be held not only by individuals but by associations and institutions. *See Chrisman* v. *Sisters of St. Joseph of Peace*, 506 F.2d 308, 312 (9th Cir. 1974). *See also, Brown* v. *Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); *Taylor* v. *St. Vincents Hosp.*, 523 F.2d 75 (9th Cir. 1975); *Doe* v. *Bellin Memorial Hosp.*, 479 F.2d 756, 759-60 (7th Cir. 1973); *Watkins* v. *Mercy Medical Center*, 364 F. Supp. 799, 803 (D Idaho 1973); *Allen* v. *Sisters of Saint Joseph*, 361 F. Supp. 1212 (N.D. Tex. 1973), *app. dism'd*, 490 F.2d 81 (5th Cir. 1974). This Court, too, has recognized the existence of an institional conscience, when it noted that a "conscience" clause, provisions in a Georgia criminal abortion statute permitting physicians and hospitals to refrain from participating in abortions, "obviously are in the statute in order to afford appropriate protection to the individual and *to the denominational hospital.*" *Doe* v. *Bolton*, 410 U.S. 179, 198 (1973). (emphasis supplied).

[52] Manifestly, if an LMRA violation be found, the ILA will be denied the right—enjoyed by every other segment of society, from corporations to consumers—to protest and disassociate itself from the Soviet aggression by refusing to do business as usual.

NLRB, 383 F.2d 235 (5th Cir. 1967).[53] They may not be defeated by narrow or strained construction by the Board or employers. *Montgomery Ward & Co.* v. *NLRB*, 385 F.2d 760 (8th Cir. 1967); *NLRB* v. *Howard Qarries, Inc.*, 362 F.2d 236 (8th Cir. 1966).

The First Circuit and the NLRB adopt the expedient of deciding this case under the labor law without reference to the inextricable First Amendment dimensions and then facilely concluding that the Constitution does not protect conduct they have already found to be unlawful. By couching their discussion in constitutionally neutral language (the "political" dispute becomes "non-labor" or "primary," the conscientious absention, "refusal to handle"), both tribunals create the facade of a secondary boycott divorced from the realities of the union conduct.[54]

This case is not the usual situation where a union's aim is clearly economic but the First Amendment is invoked because the means employed consists of activity which usually warrants constitutional protection. There the issue is whether the union is genuinely engaged in communicative activity or is using communication as a guise to achieve, for

---

[53] The First Circuit's justification for permitting the §8(b)(4) charges to curtail First Amendment rights, that the "union and its members have numerous alternative forms of internal 'expression' left to them," 640 F.2d at 1378-79, 22a, is in direct conflict with decisions of this Court that infringement of freedom of expression may not be justified on the ground that alternative means of communication are open. *See, e.g. Schneider* v. *Irvington*, 308 U.S. 147 (1939).

[54] In the course of their analyses, the court of appeals and the Board also forget that the very characteristics of petitioners' conduct which they rely on to find both jurisdiction and an a fortiori violation of the LMRA are those which invoke the protection of the First Amendment. The First Circuit permits bifurcation of the domestic from the foreign effects precisely because the latter is a non-labor—i.e., a *political*—dispute. The inference of an unlawful object is permitted because it is alleged that the effects on third parties flow inevitably from the protest itself.

an economic objective, an unlawful purpose. This was the situation in all of the cases relied on by the First Circuit and the Board. 640 F.2d at 1378-79, 22a-24a; J.A. at 30a-31a;[55] *see also, Mobile*, 419 U.S. at 229-32. It is clear that First Amendment means will not legalize activity which is inherently unlawful. *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694 (1951). But even there a delicate balancing is required between the free flow of commerce and the right of expression. *Mobile*, 419 U.S. at 228-32.

But here, where the union has no economic purpose and its conduct is exclusively to exercise protected rights, these considerations do not apply. No one has even suggested that the ILA is protesting over Afghanistan in order to get at Allied, Waterman or Clark. The present situation is admittedly rare. But every court prior to the First Circuit in this case has agreed that the First Amendment purpose protects even activity which, if done for economic ends, might be unlawful. *Ocean Shipping*, 332 F.2d at 992;[56] *Danielson*, 411 F. Supp. at 655; *Walsh*, 630 F.2d at 864.

It should be noted that three of the four circuits on whose dictum the First Circuit and the Board rely for the proposition that a primary labor dispute is not necessary for a violation of §8(b)(4) have suggested that the pres-

---

[55] The Fifth Circuit's dictum in *New Orleans S.S. Ass'n* v. *General Longshore Workers, ILA*, 626 F.2d 455, 463 (5th Cir. 1980), likewise contemplated an attempt to sanitize otherwise lawful activity by invoking the First Amendment.

[56] Unlike the case at bar, *Ocean Shipping* involved a deliberate, not an unavoidable, involvement of others in the union's protest,—a blacklist of any ship that had been used in the Cuban trade. Still, the court held that the longshoremen's mere declining "to accept employment aboard a ship deemed tainted by having engaged in Cuban trade" could not be said to be secondary in object. *Id.* at 997. In the case at bar, there is no element of blacklist or reprisal, but only a naked refusal of longshoremen themselves to become involved.

ence of a *political* dispute would protect the activity.[57] Recently, the District of Columbia Circuit, which in *National Maritime Union* v. *NLRB*, 346 F.2d 411 (D.C. Cir.), *cert. denied*, 382 U.S. 840 (1965), had declined to follow *Ocean Shipping*, said

> When the courts have drawn boundaries around the area of 'labor disputes,' they have done so *only to exclude from that category controversies in which a union acts out of a political interest* which it may share with all other citizens and which in no way enhances the distinct economic interests of its members. *NLRB* v. *Int'l Longshoremen's Ass'n, supra* n.10, 332 F.2d at 996 (stevedores express position on Cuban missile crisis by refusing to load any ship involved in trade with Cuba).

Soft Drink Workers Union v. *NLRB*, 90 LC 26,066, 26,081 n.11 (D.C. Cir. 1980). (emphasis supplied).

Thus, even those courts who would not say that a primary labor dispute is always necessary for a violation of §8(b)(4) would not go so far as to apply the LMRA where the dispute was political.[58] Similar First Amendment considerations have motivated the courts which have declined to apply the antitrust laws to boycotts not prompted by

---

[57] The Second Circuit in *National Maritime Union* v. *NLRB*, 342 F.2d 538 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965) expressly distinguished *Ocean Shipping* in that there "the cause of the work stoppage was purely political." *Id.* at 542. The Eighth Circuit in *NLRB* v. *Twin City Carpenters Dist. Council*, 422 F.2d 309 (8th Cir. 1970) stated that the charges before the court "relate[d] to no political dispute." *Id.* at 312. *See also, Mountain Navigation Co.* v. *Seafarers Int'l Union*, 348 F. Supp. 1298, 1303 (W.D. Wis. 1971), where a district court distinguished *Ocean Shipping* because the controlling factor there was the union's political animus.

[58] The First Circuit in this case carefully avoided using the terms "political" or "conscientious" (with their inevitable constitutional connotations) to describe the ILA's conduct. However, the activity in this case was *not* economic precisely because it *was* political and conscientious.

economic aims (*see* pp. 30-31 above).[59] This Court, noting the trend to limit the antitrust laws to economically motivated activity, has pointed out

> [t]he possible constitutional infirmity in the antitrust laws that a contrary construction would entail in light of the *serious threat to First Amendment freedom* that would be presented.

Lafayette v. *Louisian Power & Light Co.*, 435 U.S. 389, 399-40 n.17 (1978). (emphasis supplied). *See also, Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

The same principle should apply where the constitutionally protected activity allegedly violates the labor law. Nothing in the history of the LMRA indicates an intent by Congress that it should be used to frustrate what is plainly expressive and conscientious conduct. To make such use of the LMRA, no less than the antitrust laws, would far surpass the will of Congress and violate the First Amendment.

The constitutional antagonism is all the more apparent when one considers the conscientious dimension of petitioners' conduct. Not only is the political and expressive *end* protected, the *means* employed—the mere refusal to participate in activity perceived to be morally wrong—falls within the First Amendment's protection. Like other

---

[59] In all the antitrust cases previously cited, where all the elements for the finding of a technical violation of the Sherman Act were presented, the courts might easily have taken an approach like the First Circuit's here and mechanistically construed a violation to which they then declined to give constitutional protection. However, once they perceived a genuine First Amendment motive, they properly refused to find a violation on the grounds that political activity was simply not what the antitrust laws were designed to regulate and that the statute's use for such purpose would violate the First Amendment. *See also Henry* v. *First Nat'l Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979); *Machesky* v. *Bizzell*, 414 F.2d 283 (5th Cir. 1969).

courts[60] the First Circuit recognized the "limited scope" of the ILA's conduct. 640 F.2d at 1380, 26a. Unlike *Ocean Shipping* and the boycott cases, the union's response here was strictly limited to what conscience demanded—the refusal to handle the morally repugnant work. There can be no charge here that petitioners' conduct was "conscience plus." "The case . . . does not involve an allegation that First Amendment rights were used to achieve substantive evils. Rather, the claim is that the allegedly protected conduct *is* the substantive evil." [61]

It was never the intent of Congress to "strain through the filament" of the LMRA difficult and sensitive issues of political expression and conscience. This would abandon this Court's consistent approach to the Act. Just as in the *Benz/Windward* line the Court has refused, without express direction from Congress, to make the Act a tool for resolving foreign disputes, so, too, it has, without congressional mandate, refused to intrude the Act into the area of religious freedom. *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). To permit the LMRA to become the vehicle to frustrate a genuine attempt to exercise constitutionally guaranteed liberties would be a perversion of the statute.

The intrusion of the National Labor Relations Board reinforces the argument. The Board has no expertise in and was never intended to be the arbiter of matters of politics or conscience. Especially where, as here, the protected activity cannot be separated from its effects, to engraft the LMRA onto an essentially non-labor situation would be to give the NLRB a *de facto* veto over political and conscienti-

---

[60] The ILA's objective in the instant case is to voice a political protest against the U.S.S.R. by refusing to handle cargo bound for that country. *It has taken no steps to broaden that specific and limited objective.*

Baldovin v. *International Longshoremen's Ass'n*, 626 F.2d 445, 452 (5th Cir. 1980). (emphasis supplied).

[61] *Crown Cent. Petroleum Corp.* v. *Waldman*, 486 F. Supp. 759, 766 n.8 (M.D. Pa. 1980). (emphasis in the original).

ous conduct. Nor can the NLRB undertake the strict scrutiny to which this Court has insisted governmental regulation impinging on First Amendment rights must be subject.[62] *Kusper* v. *Pontikes*, 414 U.S. 51 (1973); *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1946); *Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264 (7th Cir. 1976). The constitutional mischief of permitting an agency of the government to resolve political and conscientious controversies is self-evident.[63]

IV.

Summary Judgment Should Not Have Been Granted.

Even if it should be held that the First Circuit was correct in its view of the law, it erred when it purported to grant summary judgment. Although the court of appeals was technically correct in treating the motion to dismiss as one for summary judgment because matters beyond the pleadings were considered, to do so in this case was fundamentally unfair. Affidavits were submitted to the district court

---

[62] The Board's approach in the present case proves the point. In its 38-page opinion, the First Amendment is given a single footnote. J.A. at 30a n.8. The administrative law judge devoted to the constitutional issue one sentence out of 69 pages.

[63] A refusal to apply the LMRA in this case in no way contemplates the use of First Amendment claims to ride roughshod over the rights of others. The remedies of state court are available. The list of values to be considered in a private tort action, enumerated in Judge Aldrich's dissent, 640 F.2d at 1384, 35a, attests to how much more suitable a forum the state court would be: the nature of the actor's conduct, the actor's motive, the interests sought to be advanced by the actor and the social interests at issue. Resolution of these issues is far more appropriate to an unbiased trier of fact than to an administrative agency trying to squeeze the case into the mold of its particular statute.

only on the question of the preliminary injunction.[44] Because the district court granted the motion to dismiss on the basis of its prior decision in *Walsh*, the ILA was never given a day in court to address the merits of Allied's § 303 case. The unfairness is compounded because, even as the record stands, triable issues of fact are presented which preclude summary judgment. *Associated Press* v. *United States*, 326 U.S. 1, 6 (1945).

The question of the union's object or intent is paramount to an 8(b)(4) violation. Even if such intent could be inferred from the necessary and foreseeable effects of the conduct, petitioners are entitled to have a trier of fact weigh the circumstantial evidence on which Allied relies in the light of all the evidence. Other courts have pointed to evidence which suggests the union had no purpose to influence others. Questions of object or intent are particularly inappropriate for determination on a motion for summary judgment. *Romero* v. *Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980); *Foster* v. *Swift & Co.*, 615 F.2d 701 (5th Cir. 1980).

Moreover, before the First Circuit's inference from foreseeable consequences can even be applied, there are triable issues as to whether the ILA refusal would have the inevitable consequences the court of appeals suggests.[45] Sim-

---

[44] On the §303 count, petitioners' sole ground was legal argument —that the decision in *Walsh*, with which this case had been consolidated, was the law of the case. J.A. at 49a, 50a. The district court recognized that the Gleason affidavit was more in the nature of a brief. Transcript of Hearing, at 21. The limited factual information submitted by petitioners was to defeat Allied's motion for a preliminary injunction based on its antitrust and tort claims, to which the earlier ruling had not applied. J.A. at 53a, 54a.

[45] These go to the availability of other ports, J.A. at 14a, 37a, 61a, and of other labor, given the facts (1) that Clark's contract permitted the use of non-ILA labor where the union was unwilling to work, S.M. at 5a; (2) that in other instances petitioner had not interfered with the unloading of a Russian ship by nonunion labor, J.A. at 62a, 63a; and (3) that non-ILA labor might have been willing to work.

ilarly, the First Circuit should not without a trial have rejected the union's claim to exercise its members' constitutional rights of expression and conscience.[46]

Thus, even if this Court should affirm on the law, it should hold no more than that a claim under § 8(b)(4) has been pleaded. It should reverse the judgment of the court of appeals and direct a trial to determine whether the allegations of the complaint can be proved.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Dated: November 19, 1981

Respectfully submitted,

THOMAS W. GLEASON
Counsel for Petitioners
One State Street Plaza
New York, NY 10004
(212) 425-3240

CONDON & DOYLE
75 Federal Street
Boston, MA 02110

Of Counsel:

ERNEST L. MATHEWS, JR.
CHARLES R. GOLDBURG
KEVIN J. MARRINAN

[46] If there be any doubt as to the attitude of rank and file longshoremen or the character of the International's position, petitioners are entitled to submit evidence on these issues to a trier of fact before First Amendment rights are facilely swept aside. See p. 35, n.47 below.